Central Law Journal.

ST. LOUIS, MO., DECEMBER 24, 1909.

SOME REFLECTIONS ABOUT THE OPINION AND DECREE IN THE STANDARD OIL CASE.

There runs through the opinion of Judge Sanborn in the Standard Oil Company case the dominant idea in the Northern Securities case and the force of the decree appears to expend itself in the mere dissolution of a holding trust. United States v. Standard Oil Co. of N. J., 173 Fed. 177.

And this result does not seem to appear to the judge to be of any more than relative importance.

Thus he speaks, in paragraph 4 of his opinion, of counsel arguing "with persuasive force that the transfer of the stock of the nineteen corporations to the principal company brought no substantial restriction of competition, because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter." To this the court replied that the power of restriction became greater, more easily and quickly exercised and hence more effective, than it could have been in the hands of three thousand scattered stockholders. We take it that the court admits, that before the holding trust there was restriction and the holding trust made it operate more practically and, therefore, more harmfully.

If, therefore, there may be a relegation to former conditions, there is strong implication that the snake of the declared evil has not been killed, but only scotched.

The great mass of evidence in the case related in great part to what had been done prior to 1899, when the stock of subsidiary companies came to be held by the Standard Oil Company, and it was shown that this great company had quite as complete, though a somewhat more cumbersome, control of things, than afterwards.

But all through the opinion and the decree comes the thought to the reader, that but for the holding trust of 1899 the government would have failed.

The decree says there is an illegal combination to monopolize trade by the destruction of competition among the principal and subsidiary companies, all potential competitors. Its operative part is, that whatever may arise out of stifling competition, as the result of stock of the subsidiary companies being held by the principal company must stop and the former be disenthralled. This stock is declared dumb, at least for awhile, and its prior commands are ordered to be disobeyed. Further than that the stock is declared to be in the hands of an illegal holder which is forbidden to receive or be paid any dividends.

It is not declared valueless, but impounded. For whom is it impounded? Naturally it might be supposed, that, if it had been acquired illegally, it ought to be restored to the hands from which it came. This, however, is not the decree, but it *may*, not *must*, be distributed to the shareholders of the Standard Oil Company ratably.

Now let us see how this works out. The Standard Oil Company of New Jersey raises its capitalization from $10,000,000 to $100,000,000, and exchanges the excess for stock of the subsidiary companies. This exchange is made for the purpose of vesting control of all the companies in one company, so as to stifle all competition between themselves. Such exchange was illegal. The *status quo*, then, should be restored. Naturally, everybody should surrender their illegally issued stock for what they had given in exchange therefor. Under the court's decree, however, they keep what they got from the Standard Oil Company, and share ratably with its original stockholders in the new distribution. To the extent that these original stockholders come in, the holdings of the exchanging stockholders may be less than double what they had before, and the original stockholders are given stock they never asked for.

It is to be said, therefore, that corporation assets being thus distributed, corporate capi-

tal has been reduced not by any statutory method, but by a sort of ukase of a federal court, operating on a state corporation.

But what is the effect, in law, of this? It seems to us to be a dissolution, *pro tanto*, of the Standard Oil Company of New Jersey, a thing never prayed for by the bill in the case, and a relief which a federal court is powerless to grant.

Even, if it be said no harm is done by this to the exchanging shareholders, the same might not be said as to other stockholders, the 3,000 of whom the opinion speaks. 2,993 of these were not parties to the suit. It would look, therefore, like the court either had the right to direct a re-exchange of stocks, or to give original stockholders in subsidiary companies the right to demand a re-exchange, or that it was powerless to touch that stock at all. If stock is re-exchanged that which was illegally issued should be canceled.

Furthermore, a re-exchange would be the more certain way to extinguish all vestige of the unlawful combination and restore the *status quo*. As it is, there remain some of the spoils of the old evil, unless this reduction of assets makes the Standard stock of no value. If it does, the old stock is confiscated.

The court's plan has another curious result. It takes away from the principal corporation the entire basis of its increased capitalization and leaves its capital stock as before. Certainly an over-capitalization. Perhaps this is not confiscation, but does it not resemble it, in a way? If that great concern would be thus left unable to pay its creditors, it might look very much to them, as if it were confiscation.

But, taking it, that the principle established by the Northern Securities case is the cornerstone of the government's success before the Circuit Court of Appeals, then speculation may well be indulged, whether it will control in this case in the Supreme Court.

There seems large room for contention, that it does not extend to this case. It is to be remembered that this principle was sustained by a bare majority of the court, and changes on the bench have taken place and more are expected.

The minority of four planted their dissent squarely upon the Sugar Refineries case, and the majority, to escape its effect, regarded the Securities Company as having no other business in life than to be a "custodian," organized for this purpose. Justice Harlan said: "There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact one of that kind." Justice Brewer thought the Securities Company was created as a mere instrumentality like the "appointment of a committee to fix rates."

But the principal company in this case was a going concern and the stock it exchanged for other stock had a positive value based on its own operations. The principle in the Northern Securities case may save the government in the higher court, but it requires at least to be extended, as the language of Justice Harlan, which we quote, does not seem entirely sufficient.

The shadow of the Sugar Refineries case looms large over the final event, for all of the majority argument in the Northern Securities Company case was to the effect that that company was a mere instrumentality, without any assets in fact. It was a sort of dummy argument which could never be asserted of the Standard Oil Company of New Jersey.

NOTES OF IMPORTANT DECISIONS.

DAMAGES—CASES OF INSTRUCTIONS OF NOMINAL DAMAGES FOR DEATH.—The case of Scherer v. Schalberg (N. Dak.), 122 N. W. 1000, discusses, but does not decide, because unnecessary in the case, the question of instructing juries to award merely nominal damages in the case of the death of a female infant. The opinion leans very plainly to the view that such damages ought to be declared the measure of recovery in such a case. The court says: "It is conceded that in actions of this nature juries are not confined to the consideration of the evidence alone, as they are in many other cases, but they may exercise a much wider latitude in applying their own knowledge and experience than would be proper in most other cases, but it is apparent that

no evidence, no knowledge or experience of the jurors could justify them in saying that in case of the child's continued life its earning capacity would have exceeded the expenditures necessary in its maintenance and education. On the contrary, the experience of mankind in civilized communities warrants the conclusion that its net earning capacity would most likely be a negative quantity. When it is impossible to arrive at a verdict except by speculation or surmise, guesswork or conjecture, the case should be taken from the jury."

Such a declaration as this appears to us to smack very strongly of judicial legislation. The legislature knew, as all men know, that nothing but the divine gift of prophecy may tell whether a child of almost any age will cost more for its education and maintenance than it will ever earn, and yet parents are given a right of action for their deaths. It did not limit age or sex, and it looks like judicial interpolation for the court to do this. A rich man's child might possibly bring to him in pecuniary return more than luxuries supplied to him, and the sickness or sloth of the poor man's child might never bring a penny to the household, which had given him a meagre subsistence. Industrial conditions might by some be thought to insure a more certain return from female, than male minors. It is "speculation, surmise, guesswork and conjecture" in every case about minors, just as there is about the future earnings of a husband or father. With a child the guesswork is merely intensified or accentuated and multiplied, but it is the law's policy and courts are not legislators, or, at least, they should not be.

Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, was a case of suit by the administrator for death of a sixteen-year old infant, and the court excluded recovery on the ground that the father, to whom the money would go, had practically abandoned his family. The court reviews Minnesota cases at length in an endeavor to show they are in accord with it, because the action was under the statute of that state, and not finding itself fully satisfied on this question said, in effect, that if it were mistaken, it would not enforce the statute except for damages purely compensatory, and cites several cases as to this. In other words while sitting to enforce state law, it will not enforce what a state's highest court says ought to be enforced.

There seems something of a tendency in courts to emasculate the statute in a way that would greatly justify legislatures in fixing an amount in all of these cases, and grading same on some sort of theory as to age of minor and to whom the recovery should go. One recovery for death as well as another is necessarily based largely on speculation, and it would save greatly in every way to take out of this beneficent advantage on the common law as much uncertainty in its application as possible.

APPEAL AND ERROR—MEANING OF "PERSON AGGRIEVED."—The Wisconsin statute limits the right of appeal to certain specified official persons and to "any person aggrieved" by the determination which a court may make. The case of Sanborn v. Carpenter, 123 N. W. 144, shows that a non-resident of Wisconsin, the sister of an alleged incompetent, who with another sister and brother are next of kin, applied to a county court for the appointment of a guardian to conserve the property of such party. The application, being granted, the circuit court reversed the county court's decision. Appeal was then taken by the petitioner to the supreme court and the alleged incompetent moved its dismissal on the ground that petitioner had no interest and was not, therefore, "aggrieved." The court refers to administrators, guardians, etc., being expressly authorized by statute to appeal and that the enumeration does not expressly embrace such a party as the petitioner.

The court argues that the statutes are themselves "significant of a marked distinction as to the conditions and persons that may originally arouse the duty of a county court to inquire into competency and those which may justify attack on its decisions, and thereby greatly enhance and aggravate the injury to the subject of the charge by multiplication of litigation and expense."

The court further said: "It is urged that the word 'aggrieved' should be extended to those upon whom will be cast the legal duty to support the alleged incompetent in case of the dissipation of his property, or to those who being directly and legally dependent upon him for support will be deprived of their legal right to such support." It was admitted that a prior Wisconsin decision supported "this general contention favorably" in favor of a son, a resident of the state, on whom the law devolved the duty of supporting his father.

But it was said: "The distinction in the case of a mere next of kin or heir apparent is that the burden cast on a son is an injury to a right presently existing in the person seeking to protect it while the mere heir apparent has no present legal right whatsoever, but a mere conjectural expectancy." It might, however, be claimed, that the expectancy while somewhat conjectural is so, if the alleged incompetent is really such, only on the

question of survivorship, and we doubt whether that conjecture ought to control so absolutely. A petitioner ought to be regarded somewhat like the representative of all those who may be heirs. In favor of such a construction is also the presumed benefit to one who is incompetent. Besides some allowance ought to be made for affection, and its disinterested purpose. The right to initiate proceedings at all seems to take these things into some account and to recognize some measure of interest upon which "aggrieved" might be based.

That mere officials are expressly provided does not seem to us to exclude this idea, as officials as such are like corporations, devoid of souls and of sentiment. It may also be further said that the theory of such a proceeding is that it is for the supposed benefit of incompetents that they are allowed at all and petitioner is but representing the true interests of the incompetent in seeking to obtain a proper judgment and the incompetent is really "aggrieved" by any other judgment. The law may presume that one bound by ties of affection will not abuse a privilege and the same policy that allows the beginning of proceedings ought to permit their prosecution in all proper jurisdictions.

EMPLOYER'S LIABILITY ACT—ITS VALIDITY IN THE TERRITORIES.—The federal supreme court has lately sustained the validity of the Federal Employer's Liability Act as to intra-territorial business, El Paso & N. E. R. Co. v. Guitierrez, (decided Nov. 15, 1909). The cause of action arose under the act as it formerly existed, and was declared unconstitutional as a regulation of interstate commerce business.

The principal contentions against validity were as to separability and whether, if separable, it was "plain that congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the Territories." Justice Day wrote the opinion which was unanimous.

While the court sustains the act from both points of view its reason for doing so does not appear to us to meet the test of the rule of intention, as above declared. Thus the court says: "Bearing in mind the reluctance with which this court interferes with the action of a co-ordinate branch of the government, and its duty, no less than its disposition, to sustain the enactment of the national legislature, except in clear cases of invalidity, we reach the conclusion, that in the aspect of the act now under consideration the congress proceeded within its constitutional power, and with the intention to regulate the matter in the District and Territories irrespective of the interstate feature of the act."

Were such an announcement to proceed from a less august tribunal, we might suspect it to be somewhat sloppy and lacking in some essential feature of proper judicature. "Reluctance" in doing this, that, or the other thing seems to be somewhat overworked by our great court. A court sits to declare legal rights and, if it has any lack of disposition to do this, it should surmount it. If reluctance gets in in one place, it may get in another, but where, no one may prophesy. It was "reluctance" largely that started the habit of this court in having independent opinions in the enforcement of state law, the pursuit of which has given to the alien and non-resident judge-made law, when others are bound by statutes.

LIABILITY OF BANKS TO THEIR DEPOSITORS FOR MISPAYMENTS OF CHECKS, AND RIGHT OF REIMBURSEMENT FOR MISPAYMENT AS BETWEEN BANKS.

The banking practice of accompanying depositors' returned cancelled checks with a notice that errors or mispayments will be held to have been waived except in so far as the depositor shall, within a certain time, bring them to the attention of the bank, naturally suggests an inquiry into the state of the existing law. The object of the present paper is to examine the liability of banks to their depositors upon mispaid checks, and the right of recourse of banks making mispayments against prior banks which have dealt with the mispaid checks.

I.

The general rule is almost undisputed, that a bank cannot charge its depositor upon a check, unless the check was drawn by the depositor, and was paid in the amount fixed by the depositor, to the person intended by the depositor.[1]

(1) Jannin v. London & S. F. Bank, 92 Cal. 14; Georgia, &c. Co. v. Love, &c., Soc., 85 Ga. 203; German Savings Bank v. Citizens National Bank, 101 Ia. 530; Murphy v. Metropolitan

Under this rule it is even held that payment of a check to a payee bearing the same name as the payee intended by the drawer is a mispayment;[2] although this view has been earnestly criticised by at least one text-writer.[3] A payment to the person actually intended by the drawer is, however, a sufficient payment, even though this person masqueraded under a false name.[4] If the depositor uses a rubber stamp for signing his checks, it is a mispayment to honor a check to which that stamp was affixed surreptitiously.[5]

Since the rule throws the responsibility for mispayment upon the bank, regardless of actual negligence, of course, it follows *a fortiori* that where the bank has been actually negligent, the depositor cannot be charged upon the check.[6]

II.

Although all the requisites of the general rule stated above may be lacking, yet a depositor is barred from recovery of the amount paid out by the bank on a check when he himself has been negligent in permitting the bank to be deceived in relation to the check. Thus in Young v. Grote,[7] the drawer was held bound upon a check in which a space had been left before the amounts, which enabled the guilty person to change the amount; in Wood v. Boylston National Bank,[8] the owner of a negotiable instrument indorsed in blank and intrusted to an agent for collection, was barred from objecting to the bank's application of the check upon its own account against the agent; and in Smith v. Mechanics &c. Bank,[9] it was held negligence to deliver a check to a stranger under suspicious circumstances.

On the other hand, in Colonial Bank v. Marshall,[10] following Scholfield v. Lindesborough,[11] drawer who left spaces before the amounts on the check was found not negligent; in Critten v. Chemical Bank,[12] drawer who signed a check in which his clerk had left such spaces was held not negligent; in Mackintosh v. Eliot National Bank and Robb v. Penn. Ins. Co., *ubi supra*, it was found not to be negligence for the drawer to have a rubber-stamp fac simile of his signature which he customarily used in signing checks; and there are, of course, other cases in which the drawer has on the facts been absolved from negligence.[13]

It is a natural corollary to the foregoing general principles, that a depositor may so act, subsequent to the mispayment by the bank, that he will be held to have ratified the mispayment.[14]

III.

Although the bank may have made a mispayment, which is not excused by any negligence on the part of the drawer, or ratified subsequently by the drawer, still the bank may have at least a partial defense against the drawer, if he seeks to have his deposit reimbursed for the mispayment. This defense originates when the depositor fails to use ordinary care in examining re-

Nat. Bank, 191 Mass. 159; Mechanics Nat. Bank v. Harter, 63 N. J. L. 578; Morgan v. Bank, 11 N. Y. 404; Citizens Nat. Bank v. Importers & Traders Bank, 119 N. Y. 195; Dodge v. Nat. Exchange Bank, 20 Oh. St. 234, 30 Oh. St. 1; United Security &c. Co. v. Central Nat. Bank, 185 Pa. 586; Brixen v. Deseret Nat. Bank, 5 Utah, 504; Hardy v. Chesapeake Bank, 51 Md. 585.

(2) Graves v. American Exchange Bank, 17 N. Y. 205; Bank of Commerce v. Ginocchio, 27 Mo. App. 661.

(3) Morse on Banks & Banking, Section 474. "Clearly justice demands that the drawer should suffer in case of error induced by such a state of affairs. . . . . The technical rule of law declaring the indorsement a forgery is too strong for the principles of justice."

(4) Robertson v. Coleman, 141 Mass. 231.

(5) Mackintosh v. Eliot National Bank, 106 Mass. 441; Robb v. Penn. Ins. Co., 186 Penn. 456. Latter case, criticised adversely in 37 Am. Law Rev. n. s. 745; commented on, Zane on Banks and Banking, page 265n.

(6) Kearny v. Metropolitan Trust Co., 186 N. Y. 611; National Dredging Co. v. President &c. of National Bank, 69 Atl. 607 (Del. 1908).

(7) 4 Bing. 253, 13 E. C. L. 420.

(8) 129 Mass. 358.

(9) 6 La. Ann. 610.

(10) 1906, A. C. 559.

(11) 1896, A. C. 514.

(12) 171 N. Y. 219.

(13) Winslow v. Everett Nat. Bank, 171 Mass. 534; Belknap v. Nat. Bank of North America, 100 Mass. 376; Leavitt v. Stanton, Hill & D. Supp. (N. Y.) 413; National Bank v. Nolting, 94 Va. 263.

(14) Charles River Nat. Bank v. Davis, 100 Mass. 413; De Feriet v. Bank of America, 23 La. Ann. 310.

turned checks, discovering mispayments, and reporting them to the bank.[15] It is, however, only a defense available in so far as the bank has been actually damaged by the depositor's neglect,[16] although the prevention of prompt recourse against a forger may be such damage as to give the bank a complete defense.[17]

Among the cases where the bank has claimed a defense by the foregoing principle are those where the depositor has neglected to discover a forgery until some time has elapsed;[18] neglected to make an examination of the returned checks which would have disclosed alterations;[19] failed to discover a forgery of his own signature;[20] delayed in notifying the bank after the discovery of a mispayment.[21]

To be sure there are some cases which seem to state that a depositor owes no duty of examining the returned checks;[22] but these cases are to be explained on their facts. Since the negligence of the drawer is a question of fact, and the duty of examination is only to make such an examination as a reasonable man would make, it may be laid down almost as a rule of law that it is not negligence for the drawer to fail to detect forged indorsements by payees;[23] it therefore happens that some of the cases deny the duty of a depositor to examine his returned checks, when the actual decision is, that the depositor will be absolved from negligence in not making an examination, where the examination would have failed to detect mispayments on forged indorsements.[24] For instance, it is not negligence for the drawer to fail to discover the forging of a payee's signature, when the signature is unfamiliar to the drawer;[25] or when the forgery of the payee's indorsement is unsuspected.[26]

A special question arises, when the drawer has a confidential clerk, to whom he intrusts the examination of the returned checks, and thus gives him an opportunity of concealing from the drawer mispayments by which the clerk has profited. In some of the cases, this has been held to be such negligence on the part of the depositor as will give the bank a defense;[27] other cases have held squarely to the contrary.[28] Probably the cases may be explained on their facts. The negligence of the depositor is a question of fact, and while it might be culpable for a small depositor to fail to examine his own checks, it might well be

(15) Morgan v. United States, &c., Co., 109 N. Y. Supp. 274; National Bank v. Nolting, 94 Va. 263; First Nat. Bank v. Rich Electric Co., 106 Va. 347; and cases cited below.

(16) Birmingham First Nat. Bank v. Allen, 100 Ala. 476; Critten v. Chemical Bank, ubi supra; Brixen v. Deseret Nat. Bank, ubi supra; President &c. v. National Dredging Co., 69 Atl. 607 (Del. 1908).

(17) Leather Mf. Bank v. Morgan, 117 U. S. 115.

(18) Atlanta Nat. Bank v. Burke, 81 Ga. 597 (delay of three years held excusable); Crawfordsville First Nat. Bank v. Lafayette First Nat. Bank, 4 Ind. App. 355; Gloucester Bank v. Salem Bank, 17 Mass. 33; Kenneth &c. Co. v Nat. Bank, 96 Mo. App. 125; First Nat. Bank v. Rich Electric Co., ubi supra.

(19) Dana v. National Bank of the Republic, 132 Mass. 156; Critten v. Chemical Bank, ubi supra.

(20) Leather Mf. Bank v. Morgan, 117 U. S. 96.

(21) Cook v. United States, 91 U. S. 389, 402; United States v. Nat. Exchange Bank, 45 Fed. 163; St. Louis v. Allen, 59 Mo. 310; N. Y. Third Nat. Bank v. Mechanics Nat. Bank, 76 Hun (N. Y.), 475; Chambers v. Union Nat. Bank, 78 Pa. St. 203; Crum v. First Nat. Bank, 219 Pa. 310. McNeely v. Bank North America, 221 Pa. 538; Brixen v. Deseret Nat. Bank, ubi supra.

(22) German Savings Bank v. Citizens Nat. Bank, 101 Iowa, 530; Manufacturers Nat. Bank v. Barnes, 65 Ill. 69; Weisser v. Deucon, 10 N. Y. 68; Welsh v. German American Bank, 73 N. Y. 424; National Bank v. Tappan, 6 Kan. 456.

(23) Jordan Marsh Co. v. National Security Bank (Mass. 1909), 87 N. E. 740; Mechanics Nat. Bank v. Harter, 63 N. J. L. 578; Welch v. German American Bank, 73 N. Y. 424; Bank of North America v. Merchants Nat. Bank, 91 N. Y. 106; United Sec. L. & T. Co. v. Central Nat. Bank, 185 Pa. St. 586.

(24) See cases in notes 16 and 17 above, and Pollard v. Wellford, 99 Tenn. 113.

(25) Brixen v. Deseret Nat. Bank, 5 Utah, 504.

(26) Murphy v. Metropolitan Nat. Bank, 191 Mass. 159; Jannin v. London & S. F. Bank, 92 Cal. 14.

(27) Dana v. Nat. Bank of the Republic, 132 Mass. 156; Leather Mf. Bank v. Morgan, 117 U. S. 96; Birmingham First Nat. Bank v. Allen, 100 Ala. 476.

(28) Kenneth &c., Co. v. Nat. Bank of Republic, 96 Mo. App. 125; Clark v. Nat. Shoe & Leather Bank, 32 App. D. (N. Y.) 316, aff. 164 N. Y. 498; Hardy v. Chem. Bank, 51 Md. 585; Morgan v. Southwestern Nat. Bank, 193 Pa. St. 1. See also Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516.

entirely proper for a capitalist of extended interests to entrust the task to a carefully chosen subordinate.

IV.

When the bank has been compelled to reimburse its depositor's account for the amount of a mispaid check, the bank naturally seeks to follow up prior parties who have dealt with the check.

It is obvious, of course, that the bank can bring action against the prior party if that party was mala fides; it is also obvious that the bank has an action against a prior party who was actually negligent.[29] It has been held that it is such negligence for a bank to pay a check to an unknown person without requiring his identification.[30]

Where the drawee bank seeks reimbursement from a prior bank, which has been neither mala fides nor negligent, the right of recovery depends largely upon the character of the mispayment, and upon the relation of the prior bank to the check. If the check was forged in its inception, the famous "doctrine of Price v. Neal" prevents the drawee from having recourse against any prior innocent party.[31] This doctrine is variously explained; the broad statement of it is, that where equities are equal, the law will leave the loss where it has fallen; the narrower explanation is, that a bank is presumed to know the signature of its depositor. The doctrine seems at first blush to be contrary to the well-known principle that money paid out under a mistake of fact may be recovered back; but whether or not that principle can be qualified in general by an examination into the nature of the mistake of fact in a given case, it certainly is fairly well established, in the case of bank checks, that where the mistake of fact is a mistake as to the genuineness of a drawer's signature, mutual as between drawer's bank and the holder of the check, the loss will be left where it falls.

The question of what is a payment sometimes becomes material, where the forgery is discovered by the drawee bank immediately after the check has been received by it. It is hardly within the scope of the present paper to inquire far into this question, but it is perhaps pertinent to point out that a payment by one bank to another through the clearing house is not final, but may be rescinded, at least during a time allowed by the rules thereof, and probably even subsequent to that time, if the other bank has not in the meantime changed its position.[32]

Where the drawee bank makes a payment on a check to which the payee's indorsement has been forged, it may obtain reimbursement from a prior bank, at least where the prior bank has indorsed the check generally, and not as an agent for collection.[33] So also it may recover the excess of a "raised check" over the amount for which it was properly drawn.[34]

(29) Marshalltown First Nat. Bank v. Marshalltown Savings Bank, 107 Ia. 329; Quincy First Nat. Bank v. Ricker, 71 Ill. 439; Nat. Bank of North America v. Bangs, 106 Mass. 441; First Nat. Bank of Danvers v. First Nat. Bank of Salem, 151 Mass. 280; Ellis v. Ohio Life Ins. Co., 4 Oh. St. 628; Orleans First Nat. Bank v. State Bank, 22 Neb. 769; People's Bank v. Franklin Bank, 88 Tenn. 299; Rowan v. San Antonio Nat. Bank, 63 Tex. 610; Canadian Bank of Comm. v. Bingham, 30 Wash. 484.

(30) People's Bank v. Franklin Bank, 88 Tenn. 299.

(31) A few of the cases illustrating the rule are: Price v. Neal, 3 Burr. 355; Gloucester Bank v. Salem Bank, 17 Mass. 42; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392; Bank of St. Albans v. Farmers &c. Bank, 10 Vt. 141; Neal v. Coburn, 92 Me. 139. Contra: First Nat. Bank v. Indiana Nat. Bank, 30 N. W. 808; Lisbon First Nat. Bank v. Wyndmore Bank, 15 N. D. 299; Canadian Bank of Commerce v. Bingham (Wash. 1907), 91 Pac. 185; Statute of Penna. of April 5, 1849, P. L. 426, see Iron City Nat. Bank v. Fort Pitt Nat. Bank, 159 Pa. St. 46.

(32) Zane on Banks & Banking, pages 236, 273, 656, and cases cited; Morse on Banks & Banking, section 352, and cases cited; Merchants Nat. Bank v. Nat. Eagle Bank, 101 Mass. 281; Nat. Bank of North America v. Bangs, 106 Mass. 441. Mftrs. Nat. Bank v. Thompson, 129 Mass. 438; Nat. Exchange Bank v. Nat. Bank of North America, 132 Mass. 147; Merchants Nat. Bank v. Nat. Bank of Commerce, 139 Mass. 513.

(33) Espy v. Cumberland Bank, 18 Wall. (U. S.) 605; Birmingham Nat. Bank v. Bradley, ubi supra; Redington v. Woods, 45 Cal. 406; United States Nat. Bank v. National Park Bank, 129 N. Y. 647; First Nat. Bank of Minneapolis v. First Nat. Bank of Holyoke, 182 Mass. 130; Pittsburg Second Nat. Bank v. Guarantee &c. Co., 206 Pa. St. 616; Hastings First Nat. Bank v. Farmers &c. Bank, 56 Neb. 149.

(34) Espy v. Cumberland Bank, 18 Wall. 605; Nat. Bank of Commerce v. Mftrs. &c. Bank, 122 N. Y. 367; Rapp v. Nat. Security Bank, 136 Pa. St. 426.

These two classes of cases are distinguished by the courts from the cases where the check has a forged signature by the rule that a drawee, although bound to know his drawer's signature, is not bound to know the payee's signature or the writing in the body of the check, and is entitled to rely on the indorsement of the prior bank to the check as a warranty of the genuineness of prior indorsements, and of the amount stated in the check. Perhaps a more scientific explanation of the distinction is, that where an indorsement has been forged, there is a new party in the situation, the true owner; he has a right of action against drawee and any person who deals with the check; and the drawee, after paying the true owner, may, by subrogation, go at the person who misused the check, however innocently. So where a check has been "raised," it saves circuity of action to permit the drawee an action to reimburse it for the excess it has erroneously paid.

Where the previous bank against whom a recovery is sought was but an agent for collection in behalf of the owner (or pretended owner) of the check, and that agency is known to the drawee bank, the latter bank, by the general principle of the law of agency,[35] cannot recover from the previous bank, when the money has been paid over by the agent to the principal before notice of the mistake.[36]

An indorsement "for collection" is a notice of the relation of the parties dealing with the check,[37] but if the indorsement is general, evidence cannot be introduced to show that actually the original deposit was for collection merely.[38] An indorsement "for deposit" is generally regarded as passing complete title to the depositary bank.[39]

V.

The rules of law being as I have stated them, the effect of a notice from a bank to its depositor, accompanying his returned checks, remains to be considered. Much of course, depends upon the wording of the notice. If the notice merely requires the depositor to examine his checks within a stated time for the purpose of discovering over-payments and forged signatures, and the time is reasonable, the notice would seem to be a proper limitation of the time during which the depositor must exercise his legal rights, and there would seem to be no reason for not giving the notice full effect.

If, on the other hand, the notice is to be interpreted in a given case as requiring the depositor to take the risk of forged indorsements, or mispayments made through the negligence of the bank, the notice enlarges the depositor's legal liability In such case, it is only effective if it enters into the contract between the depositor and his bank. In the absence of an expressed assent on the part of the depositor to the imposition of such a burden, it would hardly seem likely that the courts would so interpret the notice.

In only two cases does the point seem to be touched upon. In Dodge v. National Exchange Bank,[40] the court discusses the claim of the bank to hold a customer bound by a custom of the bank as to the mode of ascertaining the identity of the payee, and holds the bank liable for a mispayment on a forged instrument. In Clark v. Nat. Shoe & Leather Bank,[41] the passbook had the statement that all errors or irregularities

(35) LeFarge v. Kneeland, 7 Cow. 456; I. C. & R. I. Mamatt v. McLean, 1 Wend. 173.

(36) Onondaga Co. Sav. Bank v. U. S., 64 Fed. 703; United States v. American Exchange Bank, 70 Fed. 232; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Metropolitan Nat. Bank v. Lloyd, 90 N. Y. 530; National Park Bank v. Seaboard Bank, 14 N. Y. 28; Nat. C. Bank v. Westcott, 118 N. Y. 468; United States Nat. Bank v. Nat. Park Bank, 59 Hun, 495, aff. 129 N. Y. 647.

(37) Freeman's Bank v. Nat. Tube Works, 151 Mass. 513; see cases cited in note 36 supra.

(38) Prescott Bank v. Caverly, 7 Gray, 217; Brown v. Ames, 59 Minn. 476; Crosby v. Wright, 70 Minn. 251. See Selover on Bank Collections, Section 53.

(39) Ditch v. Western Nat. Bank, 79 Md. 192; contra, Beal v. Somerville, 50 Fed. 647. See First Nat. Bank v. Northwestern Nat. Bank (Ill.), 29 N. E. 884.

(40) 20 Ohio St. 234, 30 Ohio St. 1.

(41) 32 App. D. (N. Y.) 316, aff. 164 N. Y. 498.

in vouchers must be reported in ten days, or they would be held to be conclusively adjusted. The returned checks contained a slip stating that reclamations for errors and objections to entries made or vouchers returned should be made with due diligence. In finding that a depositor was not negligent who failed to examine returned checks personally and discover that his confidential clerk had raised their amounts, and then altered the bank statement, the court said that forgeries could scarcely be called "errors or irregularities," and that in any case the statement in the passbook was modified by the statement on the slip.

VI.

CONCLUSIONS.

A. A bank cannot charge its depositor for a forged, or altered check, or a check paid on a forged payee indorsement, unless the depositor himself was negligent in the inception of the check, or has so acted as to ratify the payment; but the bank will have a defense for a mispayment, pro tanto, in so far as the depositor is negligent, after the mispayment, in discovering and reporting it.

B. If, as between the bank and its depositor, the bank must bear such a mispayment, the drawee bank cannot, by the weight of authority, obtain reimbursement from the bank which presented the check, when the mispayment was on a forged check, unless the prior bank were itself negligent or mala fide. It may, however, obtain reimbursement, when not itself negligent, in cases of forged indorsements of payees for the whole amount, and in cases of raised checks for the excess amount, when the original bank had complete title to the check as far as its transferror could give it, or when it acted as an agent and has not paid over the proceeds at the time of the drawee's demand.

C. A notice by a drawee bank to its depositor, requiring him to notify the bank within a specified reasonable time of errors or mispayments, is probably proper in so far as it may be interpreted as marking out the period of time during which he must avail himself of his legal rights; but is of doubtful force, if it is to be interpreted as throwing upon him the risks which the bank, by the general principles expressed under A, is bound by law to assume.

CLEMENT F. ROBINSON.

Portland, Maine.

SALES—REPUDIATION OF CONTRACT.

FAIRBANKS, MORSE & CO. v. HELTSLEY & CO.

Court of Appeals of Kentucky, November 17, 1909.

Where the buyer of an engine from a manufacturer notified the seller before the engine had been seen, tendered, or delivered that he would not accept it, and for this reason there was no delivery and the title at all times remained in the seller, he could not maintain an action for the price.

HOBSON, J.: Fairbanks, Morse & Co. brought this suit against S. W. Heltsley & Co. in the Todd circuit court. The defendants demurred to the petition; their demurrer was sustained. The plaintiff filed an amended petition. The defendants demurred to the petition as amended. The demurrer was sustained, and, the plaintiff failing to plead further, the petition was dismissed. The plaintiff appeals.

The facts stated in the petition are briefly these: The plaintiff is a corporation created by the laws of Illinois. On July 30, 1908, it entered into a written contract with the defendants by which it agreed to deliver on board the cars at Elkton, Ky., one 15-horse power gasoline engine, for which the defendants agreed to pay it $600. The plaintiff immediately proceeded to build and equip an engine in compliance with the terms of the contract, and crated and prepared it for shipment from its factory to Elkton; but before it was shipped the defendants notified the plaintiff that they would not receive the engine if

shipped, or pay for it, and for this reason it did not ship the engine, although ready and willing to do so. No part of the contract price was paid, and on these facts the plaintiff asked judgment for the contract price, $660, and costs.

In Cook v. Brandeis, 3 Metc. 555, the plaintiff sold certain wheat to the defendants to be thereafter delivered, but the defendants, when the time came for delivery, refused to receive it. The plaintiff thereupon sold the wheat for less than the contract price, and brought a suit to recover damages. In defining his rights the court said: "In such case—that is, where the vendee refuses to receive the thing bargained for—the vendor may consider it as his own, as if there had been no delivery, and recover the difference between the value at the time and place of delivery and the contract price; or he may sell it with due precaution and diligence to satisfy his lien for the price, and then he may sue and recover only the unpaid balance of the contract price, or he may consider it as the property of the vendee subject to his call or order, and then he recovers the full price which the vendee was to pay. In either case the election rests with the vendor; the vendee having violated his contract." In the subsequent case of Bell v. Offutt, 10 Bush. 632, Bell had sold certain hogs to Offutt to be thereafter delivered, and Offutt declined to take the hogs when tendered. Bell thereupon sold the hogs for less than the contract price, and brought suit for damages. The court there laid down the same rule as in Cook v. Brandeis. But it will be observed that in both of these cases the seller had sold the property in the open market for the best price attainable, and the court did not have before it the question what he must do to recover the contract price in order that the thing sold might be regarded as the property of the purchaser. This question was presented in Webber v. Minor, 6 Bush. 463, 99 Am. Dec. 688. In that case, the plaintiff had sold a lot of wood, which the defendant refused to receive, and brought an action for the price while he still had the wood. The court, holding that he could not recover the price, said: "According to the case of Cook v. Brandeis and Crawford, 3 Metc. 555, relied on for the appellee, and the authorities therein cited, the appellee might on the refusal of the appellant to receive and pay for the wood, if he was bound to do so by the contract, have either kept the wood and recovered by proper action the difference between its value at the time and place of delivery and the contract price, or he might have sold it with due precaution and diligence, and then have sued for and recovered the difference between the price received and the contract price, or he might upon making an actual or constructive delivery of the wood have recovered the full contract price, the measure of relief sought in this action. But, although the evidence conduces to sustain the plaintiff's averments of the contract, and his readiness and offer to deliver the one hundred and fifty-four cords of wood, and the refusal of the defendant to receive it, these facts do not in our opinion constitute, actually or constructively, a complete performance of the contract; for, conceding that a substantial compliance with his undertaking did not require that he should place the wood upon the brickyard against the will of the defendant, he should have set it apart for the defendant, and relinquished his own control of it at or as near to the place of delivery as was reasonably practicable. This would have been a constructive delivery of the wood, not merely an offer or tender of delivery. Duckham v. Smith, 5 T. B. Mon. 372; 2 Story on Contracts, sec. 800. And, as there would have remained nothing more for the plaintiff to do to vest the property in the defendant and render the sale absolute, he might then have recovered the contract price of the wood. But he was not entitled to a recovery to that extent upon the allegation and proof only of a tender or offer of delivery, which, if true, neither divested him of the legal title nor the possession of the wood."

This case followed the rule which had been previously announced in Williams, etc., v. Jones, etc., 1 Bush. 621, and it has been followed in Wells v. Maley, 6 Ky. Law Rep. 77; Miller v. Burch (Ky.), 41 S. W. 307; Singer Manufacturing Co. v. Cheney (Ky.), 51 S. W. 813; Hauser v. Tate, 105 Ky. 701, 49 S. W. 475, 20 Ky. Law Rep. 1716. A contrary rule was not laid down in Jones v. Strode, 41 S. W. 562, 19 Ky. Law Rep. 1117, or in Hollerbach and May Contract Company v. Wilkins (Ky.), 112 S. W. 1126. In each of these cases the action was brought to recover damages for the breach of the contract. In Benjamin on Sales, sec. 1117, the rule is thus stated: "When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract as has been explained in Book II, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of

his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer is for damages for nonacceptance. He can in general only recover the damage that he has sustained, not the full price of the goods. The law with the reason for it was thus stated by Tindal, C. J., in delivering the opinion of the Exchequer Chamber in Barrow v. Arnaud: 'Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them.'"

Here there was a contract to make a gasoline engine, and to deliver it on board the cars at Elkton, Ky. Before the manufacturer had shipped the engine, and before it had been seen, tendered, or delivered to the purchaser, he notified the seller that he would not take it. The property in the engine had not passed. The engine remained at the manufacturer's factory. It was its property, and was subject to its control. The plaintiff had in no manner released its control of the engine. If the engine had been destroyed, it would have been at the plaintiff's loss, and any insurance upon it would have belonged to the plaintiff. That in such a state of case an action for the price cannot be maintained is sustained by the great weight of American authority. Mechem on Sales of Personal Property, secs. 1091, 1092; Newmark on Sales, sec. 391; 24 Am. & Eng. Ency. of Law, 1118; Note to Gardner v. Deeds, 7 Am. & Eng. Ann. Cas. 1175, 1176; Oklahoma Vinegar Company v. Carter, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112; McCormick v. Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393, and cases cited.

The plaintiff's petition states no facts to constitute a cause of action for damages for the breach of contract. It is simply an action for the price; no facts being stated upon which a judgment for damages could be rendered. The dismissal of this action will not bar another action for damages for the breach of the contract, as a judgment upon an insufficient petition is never a bar to another action.

Judgment affirmed.

NOTE.—*Remedy of Seller, Notified Before Shipment that Buyer Will Not Accept Delivery.*—In 68 Cent. L. J. 198, we considered, in annotation, the question of "Passing of title before payment of price," and in 69 id. 220, we referred to the rule governing the case of "property tendered upon condition that buyer pays cash." We cited in the latter discussion the following from Ackerman v. Rubens, 167 N. Y. 405: "When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get and sue for the balance of the purchase money." That case would seem to be against the principal case, unless it is distinguishable in the fact, that there was no feature in it as to future delivery by the seller. The court's statement of facts show that "the plaintiff sold his yacht Iola to the defendant for $2,250, by an executory contract which impliedly provided that the title should not pass until the purchase price should have been fully paid." Plaintiff's obligation to deliver had no future about it, nor did defendant's to receive, but either was in a position to demand instant compliance. And whatever was waived as to such compliance was personal to him doing so. But here the question concerns, as Mr. Bryan might say, the "twilight zone" between agreement to sell and the time of the completion of the contract, and the notification in that time. Has such a seller the three remedies indicated by the New York case, or only one or two of them? There is no such zone, according to New York decision, where the contract reasonably requires time for seller to make delivery, arising out of the nature of the article shown and the transportation to intervene, if delivery is begun and accepted as such and is being continued, unless seller chooses to accept notice as to the portion undelivered. Zerwilliger v. Knapp, 2 E. D. Smith, 86. In such case the three remedies would exist. And so all these remedies exist in the case of a sale of articles to be manufactured and then delivered, where there is no evidence of a refusal by buyer to complete sale until the agreement to manufacture has been fully performed. Donnell v. Hearn, 12 Daly, 230. See also Ballentine v. Robinson, 46 Pa. (10 Wright) 177, which is to same effect. But a later case in Pennsylvania rules in accord with the principal case and states the matter in a way which is not easily forgotten. Thus there was an accepted order for goods to be shipped on a certain day, said goods not being specific, but to be separated from a bulk and set apart to vendee. In the meantime the buyer notifies the seller not to ship. The court said: "It is plain that the notice given to the plaintiffs by the defendant was a repudiation of the contract; it was not a rescission, for it was not in the power of anyone to rescind; but it was a refusal to receive the goods, not only in advance of the delivery but before they were separated from and set apart to the defendant." Unexcelled Fireworks Co. v. Polites, 130 Pa. 536, 17 Am. St. Rep. 738. This case may differ from the principal case in that a particular engine was contracted for, but it does not certainly appear that it was not an engine to be taken from stock on hand. The principal case does not consider

any such question. In Rounsaville & Bro. v. Leonard Mfg. Co., 127 Ga. 735, it was held that where goods are ordered, but not yet shipped, the contract can be repudiated, because the contract is still executory and seller's remedy is not to ship and sue for price, but the code remedy is one of three: (1) damages on breach, (2) sell as agent for purchaser and recover the difference, or retain or store for buyer and sue for price, but that is only because the code specifically so provides. As a matter of general law, however, the leaning of the court seems to be, that the first would be his only remedy.

In St. Louis Court of Appeals this executory contract idea is not recognized as to sale of specific articles to be manufactured after they have been manufactured and ready for delivery, and notice at or after then left the buyer his choice of the three remedies stated in the Ackerman case, *supra*. St. Louis Range Co. v. Mercantile Co., 120 Mo. App. 438. The opinion in this case is by Judge Goode and he distinguishes between specific articles to be manufactured, where the contract to manufacture has been performed, and "a sale of goods generally like merchandise or corporate stocks currently dealt in, when it is contemplated that specific articles or stocks shall be subsequently selected and delivered pursuant to the contract." This is the principle of the Fireworks case, *supra*. See also cited by Judge Goode, Bethel St. Co. v. Brown, 57 Me. 9; Shawhan v. Van Nest, 25 Oh. St. 490; Mitchell v. LeClaire, 165 Mass. 365. The reason for this distinction is that in manufactured articles the assumption is that the buyer has "acquired title to the property and that it is held subject to his order, or else that it is worthless in the hands of the vendors so that the latter cannot reimburse themselves for their loss by using or disposing of it." But in the case in which this distinction was drawn it appeared that plaintiff had treated the specific articles as his own and while they had no market value, they were not like a suit of clothes or a portrait for a particular buyer, and recovery was allowed, but difference in contract price and value arrived at in another mode than as based on market value. While the point, therefore, which we have here was not actually involved in this case, the reasoning and citation of authority are pertinent.

In Fountain City Drill Co. v. Peterson, 126 Wis. 512, recovery for agreed price was sustained where delivery was made to carrier, because countermand of the order was not sufficiently unambiguous and specific. The court said: "For the purposes of this argument we may concede the right of a purchaser to repudiate the contract, and, by notification to the seller, to limit liability to the damages caused by the breach so committed," citing therefor late cases in Wisconsin Supreme Court, viz.: Merrick v. Ins. Co., 124 Wis. 221: Woodman v. Blue Grass L. Co., 125 id. 489. But it is said "the notice of repudiation must be so authoritative and unambiguous as to wholly and beyond doubt absolve the seller." In the Woodman case it was said: "The law with regard to an anticipatory breach of an executory contract doubtless is that the other party must treat it as a breach, and that if he does not do so, but continues to demand performance, he will be held to have kept the contract alive for the benefit of both parties. In other words, he cannot treat the repudiation both as a breach and as no breach at the same time." All of which means that, if it is thus kept alive and the party who gave the antecedent notice wishes to repent of his notice, he may, but he does not have to stand as a purchaser, if he does not wish to.

These additional cases we have cited appear to show the principal case is supported in reason and authority. C.

JETSAM AND FLOTSAM.

MOTOR OMNIBUSES: A NUISANCE OR NOT?

This Journal lately contained an annotation on responsibility of owner of an automobile as a dangerous machine (69 Cent. L. J. 360), and we reproduce what follows, showing a somewhat like view in England:

The advent of the motor omnibus has naturally been followed by a number of actions brought against their owners by victims of street accidents. The majority of such cases are, of course, not worthy of report, turning as they do upon pure questions of fact, negligence on the part of the driver or not, contributory negligence on the part of the plaintiff or not. But there is a small group of decisions which have raised questions of law and have, therefore, found their way into the various reports, and which are deserving of some consideration. The latest of them in order of date is Parker v. London General Omnibus Company, Limited (1909), in which the Court of Appeal affirmed a decision of a divisional court, reported at (1909), 73 J. P. 283. The decision is of some importance because it deals with the doctrine of "nuisance" which had been more than once successfully invoked by plaintiffs in these running down cases, and which at one time looked likely to cause omnibus companies considerable trouble. There is, we apprehend, no doubt that a vehicle may be so uncontrollable and so likely to cause accidents, however skillfully managed, as to be a "nuisance" if worked upon a public highway. Whether its behavior is bad enough to bring it within the category of a nuisance is a question of fact for a jury; and, if they so find, the person responsible for running it may be indicted, and, moreover, anyone who suffers particular damage from it can maintain an action. In Parker's case a boy was knocked down by a motor omnibus, and brought an action, founding his claim on the driver's negligence. The jury found that the driver was not guilty of negligence, and were then asked (apparently as an afterthought) whether the omnibus was a nuisance. Upon this point they could not agree, and the courts above had to consider whether there was any evidence sufficient to support a finding of negligence, even if a jury returned one. The material facts were very simple. The plaintiff and another boy stepped off the pavement in front of an omnibus traveling at eight or nine miles an hour on a greasy road. The driver applied his brakes suddenly, cutting off his motive power and slewing round the fore part of the omnibus to avoid the boys. Not unnaturally, the back part swung round "skidding," and the side of the omnibus struck the plaintiff. In cross-examination the driver said: "If the road is in a bad state and you stop suddenly, it will skid. Eight to nine miles is a fair pace. The faster we go the more difficult it is to prevent skidding. You cannot prevent the skidding. They have not yet found any means of preventing it." Upon these facts the court had no difficulty in holding that there was

no evidence that the omnibus was a nuisance. It will be remembered that the jury negatived negligence or mismanagement; in other words, it must be taken that the driver was proceeding at a proper pace having regard to the habits of his omnibus and to the impediments which he could see or ought reasonably to be expecting. The act of the boys in stepping onto the road was something against which he could not guard, and the mere fact that his adoption of the proper remedies caused the omnibus to skid did not necessarily point to it being a nuisance. As Darling, J., pointed out: If a horse is pulled up suddenly to avoid one person, it may easily fall and injure someone else. The effect of the decision appears to be that companies have not much to fear from the doctrine of nuisance on the ground of skidding. Granted that an omnibus is prone to skid if pulled up too suddenly, a driver's duty is to keep so much clear space before him and to travel at such a pace as to be able to pull up safely and avoid a vehicle or person stopping or crossing in front in a reasonable manner. If he fails to do this he will be negligent; but, if once negligence is negatived, there will be little fear of a finding of nuisance, for the absence of negligence on the part of a driver acquainted with the peculiarities of his omnibus points almost conclusively to the fact that the plaintiff brought about an unexpected state of affairs rendering skidding no proof of such inherent vice as would amount to a nuisance. Another case in which the same question was discussed was Wing v. London General Omnibus Company (1909), 73 J. P. 429. Here, too, the Court of Appeal decided in favor of the company, reversing a divisional court (ibid. p. 170), but it may be noted that Buckley, L. J., who agreed with the decision in Parker's case, dissented in Wing's case. The plaintiff this time was a passenger in the erring vehicle, and was injured in consequence of its collision with a lamp standard, such collision being due to skidding brought about by avoiding other vehicles while traveling about five miles an hour. To a great extent the difficulties experienced by the lords justices appear to have arisen from the form of the county court judge's notes and the way in which the case was framed at the trial. It is, indeed, not easy to say exactly what the effect of the decision is, but we think that it may be fairly stated as follows: A plaintiff who seeks to recover on the ground of a nuisance must give definite and affirmative evidence of something more than the fact that all motor omnibuses are liable at times to skid, and that the particular omnibus did skid without any negligence on the part of the driver on this particular occasion.

Three other cases arose out of damage done by omnibuses to lamp-posts on the footway, such damage being due, not to the omnibus mounting the curb, but to its overhanging the pavement, such "overhang" being in part due and accentuated by the camber of the roadway. The latest decision is Barnes Urban District Council v. London General Omnibus Company (1909), 73 J. P. 68. In that case an omnibus in daylight knocked over a lamp-post standing on the pavement. No affirmative evidence of negligence (on which the plaintiffs based their claim) was given, and the defendants called no evidence negativing negligence. It was held that judgment ought to have been entered for the plaintiffs, and the following proposition was laid down: If a vehicle in daylight damages a fixed structure on the pavement, the fact of the collision is prima facie evidence of negligence on the driver's part, and the defendants must displace it by showing that the driver was using reasonable care.

An almost similar case had arisen previously in Isaac Walton and Company v. Vanguard Motor Bus Company (1908), 72 J. P. 505, the only difference being that in that case the omnibus had skidded on to the lamp-post, whereas in the Barnes case there was, apparently, no skidding. In the Vanguard case the county court judge held that there was no evidence of negligence. The divisional court disagreed with him, but did not take the course which they subsequently did in the Barnes case. Instead of entering judgment for the plaintiffs they ordered a new trial on the question of negligence, and we presume that the distinction is that where without skidding an omnibus knocks down a lamp the mere collision is prima facie evidence of negligence; but when once skidding is proved it is no longer fair to presume that the driver was responsible unless he proves the contrary. As the curb and lamp are fixed objects, the fact that an omnibus skidded on to the latter seems to show that the driver approached too rapidly and pulled up too suddenly; but, of course, his conduct may have been rendered necessary by the unexpected behavior of a third party. The last of our cases, Gibbons v. Vanguard Motor Bus Company (1908), 72 J. P. 505, is one upon which too great reliance ought not, we think, to be placed. It appeared that a motor omnibus skidded into a lamp on a day when the roads were greasy. The county court judge found that the driver was guilty of no personal negligence, that it was a well-known fact that in certain conditions motor omnibuses were liable to skid, and that when they did so it was impossible to control them; and he held that in these circumstances the defendants were liable for placing a nuisance on, and for negligently using, the highway. He accordingly gave judgment for the plaintiff, and a divisional court refused to interfere.

Now, on the nuiance point the case seems to be at variance with the two Court of Appeal decisions referred to at the outset. On the other hand, so far as negligence is concerned, we doubt whether a jury would take the same view. If the courts are to hold that an omnibus is not a nuisance merely because it sometimes skids, it must, we think, be on the assumption that it will not skid if reasonably handled, and putting aside any extraordnary circumstances it seems to follow that if a driver allows it to skid on to a stationary object, he has either omitted to notice that object or has approached it at too great a speed.—The Justice of the Peace, London.

HUMOR OF THE LAW.

A buxom young woman of some twenty summers came into my office the other day, relates one of our correspondents, to see me in regard to securing for her a divorce. We talked over the case, and I advised her that we would probably have no difficulty in securing the decree on the ground of non-support, and that it was likely to be a default case.

She then asked me our fee and I told her it would cost her $40.

"Well" she said, "mother has gotten three divorces and I have gotten two for $25 each, and that is all I'm going to pay for this one."
—Ohio Law Bulletin.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Action**—Misjoinder.—If three actions were proper, for relief sought in one, the court should have ordered the pending action divided into three, and not have given leave to bring two new actions, under penalty of dismissal of the pending action, under Revisal 1905, sec. 476.—Ricks v. Wilson, N. C., 65 S. E. 614.

2. **Adverse Possession**—Tacking Successive Possessions.—Possession for the statutory period need not be continued in the same person to constitute adverse possession; but where there is privity between persons successively in possession, holding adversely to the true title continuously, the successive periods of occupation may be united to make up the statutory time.—Bryant v. Cadle, Wyo., 104 Pac. 23.

3.——Uninclosed Private Lands.—The use of uninclosed private lands to pasture live stock held merely permissive, creating no title and terminable at any time.—McIlquham v. Anthony Wilkinson Live Stock Co., Wyo., 104 Pac. 20.

4. **Aliens**—Minor Son of Chinese Merchant.—A minor Chinese person, the son of a United States Chinese merchant, having lawfully entered the country while a minor as a student, held entitled to remain after attaining his majority, though he has since worked as a laborer—United States v. Foo Duck, U. S. C. C. of App., Ninth Circuit, 172 Fed. 856.

5. **Appeal and Error**—Failure to Take Cross-Appeal.—Where no cross-appeal is taken, appellee cannot be heard to question the sufficiency of the findings and decree of the court below.—McCoy v. Crosfield, Or., 104 Pac. 423.

6.——Finality of Order.—Order vacating judgment and permitting defense held not a final order from which an appeal would lie.—W. L. Moody & Co. v. Freeman & Williams, Ok., 104 Pac. 30.

7.——Matters Considered on Rehearing. — A proposition not advanced at the original hearing will not be considered on application for rehearing.—Hireen v. R. W. English Lumber Co., Colo., 104 Pac. 84.

8.——Misjoinder of Causes.—The question of misjoinder of causes of action, must be raised in the trial court, or it will be treated in the Supreme Court as waived.—Kansas City, M. & O. Ry. Co. v. Shutt, Ok., 104 Pac. 51.

9.——Review.—Every presumption is in favor of the action below, and if but a partial record is presented on appeal, and it can be sustained on any conceivable state of facts, which a complete record might have disclosed, the judgment will be affirmed.—Faulkner v. Baltimore & O. S. W. R. Co., Ind., 89 N. E., 511.

10.——Right of Appeal.—Where no statute expressly or impliedly authorizes an appeal in a proceeding, no right of appeal exists.—Bear v. Reese, Ind., 89 N. E. 522.

11.——Right to Appeal.—An executrix held entitled to appeal from an order granting a family allowance to infant beneficiaries only in her representative and not in her individual capacity.—In re Snowball's Estate, Cal., 104 Pac. 446.

12. **Assignments**—Actions for Tort.—A cause of action for the wrongful destruction of personalty by fire held not assignable.—Kansas City M. & O. Ry. Co. v. Shutt, Ok., 104 Pac. 51.

13. **Attachment**—Damages.—One whose property has been taken under process directed against another is entitled to actual damages.—Speth v. Maxwell, Ga., 65 S. E. 580.

14. **Bankruptcy**—Pending Actions.—A trustee in bankruptcy, intervening in a state court, held not to have the right to watch the suit for months and after a partial decree by consent, and then on the general pleadings have all that has been done considered a nullity so far as it hurts him, and leave the rest standing.—Wikle v. Jones, Ga., 65 S. E. 577.

15. **Banks and Banking**—Title to Assets.—Stockholder and director of bank, inadvertently mingling certain of his assets with those of the bank at the sale of his stock, held not estopped to set up title thereto.—People's Nat. Bank v. Board of Com'rs of Kingfisher County, Ok., 104 Pac. 55.

16.——Ultra Vires Acts.—A purchase of national bank stock for speculation by a national bank is ultra vires.—Metropolitan Trust Co. of New York v. McKinnon, U. S. C. C. of App., Second Circuit, 172 Fed. 846.

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